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In the Supreme Court of the United States

October Term, 1945.

MUSKOGEE ELECTRIC TRACTION COMPANY, A CORPORATION, *Petitioner and Appellee below,*

vs.

VICTORY INVESTMENT CORPORATION, A CORPORATION, *Respondent and Appellant below.*

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOSEPH C. STONE,
WILLIS ROTHWELL BANKER,
A. CAMP BONDS,
Solicitors for Petitioner.

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PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court:

Muskogee Electric Traction Company, a corporation, prays that a Writ of Certiorari issue to review the decision of the United States Circuit Court of Appeals for the Tenth Circuit, reversing the judgment of the United States District Court for the Eastern District of Oklahoma entered October 14, 1944, denying to plaintiff Victory Investment Corporation recovery of a judgment upon certain corporate bonds issued by Muskogee Electric Traction Company under date of May 1, 1912, due May 1, 1934. The trial court held the action barred by limitations. The Circuit Court reversed.

Opinions Below.

The District Court did not write an opinion, but expressed its views in Findings of Fact and Conclusions of Law (R. 30-41). The opinion of the Circuit Court of Appeals (R. 45-50) is not yet reported.

Jurisdiction.

The opinion of the Circuit Court was filed April 25, 1945. Rehearing was denied October 1, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

Does certain statistical data of doubtful meaning contained in copies of corporate trial balance sheets, mailed to the trustee under a deed of trust given to secure the payment of corporate bonds, constitute under applicable Oklahoma statutes as construed by the Oklahoma Supreme Court and by this Court, sufficient acknowledgment of the corporate indebtedness to toll the statute of limitations in a bondholder's action at law.

Statutes Involved.

Section 95, Title 12, Oklahoma Statutes 1941:

> "Civil actions, other than for the recovery of real property, can only be brought within the following periods, after the cause of action shall have accrued, and not afterwards:
>
> "First: Within five years: An action upon any contract, agreement or promise in writing."

Section 101, Title 12, Oklahoma Statutes 1941:

> "In any case founded on contract, when any part of the principal or interest shall have been paid, or an acknowledgment of an existing liability, debt or

claim, or any promise to pay the same shall have been made, an action may be brought in such case within the period prescribed for the same, after such payment, acknowledgment or promise; but such acknowledgment or promise must be in writing, signed by the party to be charged thereby."

Statement.

May 1, 1912, Muskogee Electric Traction Company issued its negotiable coupon bonds totalling $600,000.00 due May 1, 1934, bearing interest at 5%. A mortgage deed of trust covering the maker's electric transportation system in the City of Muskogee, Oklahoma, and securing the bonds and interest was made to the Equitable Trust Company of New York. This deed of trust contained the following covenant on the part of the maker:

> "It will annually during the month next following the close of the fiscal year send to the trustee a statement of its operations for the preceding twelve months, which statement shall include among other things its gross income and sources thereof, its operating expenses with the respective amounts charged to the different distributive groups and cost of betterments, extensions and improvements made, and any other data which the trustee may require, and such statements shall be open to the inspection of the bondholders."

Prior to November 1, 1930, $298,000.00 of these bonds had been repurchased by the trustee under the provisions of the trust deed, leaving $302,000.00 outstanding. No principal or interest on the outstanding bonds has been paid since that date, nor any sums provided by the Traction Company for payment.

Plaintiff Victory Investment Corporation acquired bonds and coupons of the face value of $101,025.00 during the years 1942 and 1943, and on September 8, 1944, sued at law for recovery of the amounts alleged to be due thereon.

The trustee was not made a party nor foreclosure of the deed of trust sought. To avoid the bar of the five-year limitation statute plaintiff plead and relied upon certain statistical data sent by the Traction Company to the Chase National Bank, successor trustee, at irregular intervals during the years 1932 to 1940, inclusive (R. 34), the last being a copy of the company's operating report and trial balance for the month of August, 1940, but forwarded to the trustee December 1, 1940. A description of these so-called reports appears in the trial court's Findings of Fact (R. 34-35). All consisted of numerous sheets of paper, all typewritten, without signature or attestation, but each accompanied a letter of transmittal over the signature of the general manager, in which they were referred to as "Operating, Financial and Statistical Reports and Statements." The various pages were headed: "Comparative Statement of Income," "Operating Expense," etc., and disclose that they constitute a comparison of the company's bookkeeping records with the same month for the preceding year. Page 10 is headed "General Trial Balance" in which appears, among others, the following items:

"Account Number	*Designation*	*Amount*
407	Cash-Bondholders Account	$ 7,193.05
433	Matured Interest Unpaid	255,000.00
434	Matured Funded Debt Unpaid	600,000.00
434	Matured 2% Tax on Bonds	4,800.00"

At no point in the data is to be found any reference to any bonded indebtedness.

In its Conclusions of Law the trial court held (R. 38-39):

> "The rule announced by the Supreme Court of the State of Oklahoma as to what constitutes an acknowledgment under 12 O. S. A. 101, may be stated as fol-

lows: Although the acknowledgment need not be in any particular form, there must be an unqualified and direct admission of a present subsisting debt on which the party signing the admission is liable. This admission must be made by the party to be bound.

"The statement filed with the trustee banks mentioned in the foregoing conclusion does not meet the requirements of Oklahoma law for extending the time within which suit may be brought on a debt barred by the statute of limitations. * * * "

The Circuit Court reversed the decision of the trial court, holding the data forwarded to the trustee to be a sufficient acknowledgment.

Reasons for Granting Writ.

The decision of the Circuit Court of Appeals holding the action to be not barred by limitations is a decision of an important question of local law in a way probably in conflict with applicable local decisions, and probably in conflict with decisions of this, The United States Supreme Court, construing the applicable local statutes.

The Oklahoma statutes applicable were adopted from Kansas by the Oklahoma Territorial Legislature in 1893, and by the terms of the Enabling Act of June 16, 1906, became the law of the state. The construction placed upon these statutes by the court of last resort of the parent state is controlling on the adopting state, so that such construction became a part of the law of the adopting State of Oklahoma.

—*Barnes* v. *Lynch*, 9 Okl. 11, 59 Pac. 995;
United States v. *Choctaw, O. & G. R. Co.*, 3 Okl. 404, 41 Pac. 720;
Harness v. *Meyers*, 143 Okl. 147, 288 Pac. 285;
Marlin v. *Lewallen*, 48 S. Ct. 248, 276 U. S. 58, 52 L. ed. 467.

Long prior to its adoption by Oklahoma, the statute providing that limitations may be tolled by an acknowledgment in writing had received thorough consideration by both the Supreme Court of Kansas and by this Court. In 1877, the Supreme Court of Kansas, in *Hanson* v. *Towle,* 19 Kan. 273, laid down the proper rule of interpretation as follows:

> "A mere reference to the indebtedness, although consistent with its validity and implying no disposition to question such validity, or a mere suggestion of some action concerning it, is not such an acknowledgment as is contemplated by Section 24 of the code of civil procedure as sufficient to suspend the running of the statute of limitations. There must be an unqualified and direct admission of a present subsisting debt on which the party is liable, and which he is willing to pay."

Save for modification by subsequent cases through striking from the above rule the requirement that the acknowledgment must express "a willingness to pay," the rule as stated in *Hanson* v. *Towle* has remained the law in Kansas, and upon adoption of the statute by Oklahoma, became the rule therein.

Such interpretation was applied by this Court in *City of Fort Scott* v. *Hickman,* 112 U. S. 163, 28 L. ed. 636:

> "'An acknowledgment of an existing liability, debt or claim' within the meaning of the Kansas statute, implies a meeting of the minds, the right of the creditor to take what is written as an acknowledgment to him of the existence of the debt, as well as the intention of the debtor, as deduced from the contents of the writing and all the facts accompanying it, to make such acknowledgment."

It is noted that the Supreme Court of Kansas, in *Hanson* v. *Towle,* and this Court in *Fort Scott* v. *Hickman,* both cited and relied on *Bell* v. *Morrison,* 26 U. S., 1 Peters 351, wherein Justice Storey said:

"If the expressions be equivocal, vague and indeterminate, leading to no certain conclusion, but at best to probable inferences which may affect different minds in different ways, we think they ought not go to a jury as evidence of a new promise or to revive the cause of action."

Both *Hanson* v. *Towle* and *Ft. Scott* v. *Hickman* have been consistently cited and followed by the Supreme Court of Oklahoma, as correct interpretations of the applicable statutes:

Olatmanns v. *Glenn,* 78 Okl. 70, 170 Pac. 886;
American Surety Company v. *Steele,* 84 Okl. 166, 203 Pac. 1043;
Baker v. *Christy,* 172 Okl. 32, 44 P. (2d) 16;
Filtsch v. *Johnson,* 174 Okl. 132, 50 P. (2d) 138;
Noble v. *Bodovitz,* 175 Okl. 432, 52 P. (2d) 1048;
Vernon National Farm Loan Assn. v. *Helf,* 191 Okl. 292, 129 P. (2d) 845;
First National Bank of Harrah v. *Wright,* 135 P. (2d) 344.

In the *Olatmanns* case, cited in all later Oklahoma decisions, the court said:

"A memorandum, however, must express the essential elements of a contract with reasonable certainty so that it constitutes a direct and unequivocal admission of a present debt for which the party signing the admission is liable."

Taken together, the decisions hold the local law to be: To delay the operation of limitations, an acknowledgment must be clear, distinct, direct and unequivocal; it must show the intention to acknowledge the debt as presently existing and at least infer a promise to pay same, and the creditors must so understand it. If it leads to no certain conclusion, but only to inferences which may affect different minds to different conclusions, it is wholly insufficient.

It is submitted that the decision of the Circuit Court is in conflict with this rule and the decisions of the Supreme Court of Oklahoma and of this Court. The trial court, reviewing all of the evidence, held that the data submitted by the Traction Company to the trustee "does not meet the requirements of the Oklahoma law" for tolling the statute. The evidence was not before the Circuit Court, the appeal having been taken solely upon the trial court's Findings of Fact and Conclusions of Law. The Findings of Fact show that the matter submitted to the trustee consisted simply of typewritten copies of the company's monthly balance sheets, reflecting only bookkeeping entries, and were in no sense intended as legal assertions of assets or acknowledgments of liabilities. Hence, the statements were not "acknowledgments" within the rules laid down by the Oklahoma decisions, and the refusal of the Circuit Court so to hold was in direct conflict with Oklahoma law and the applicable Oklahoma decisions.

The position of petitioner in this respect finds unanimous support in the opinions of the courts of last resort of other states having identical or similar statutory provisions.

—*Weir* v. *Bauer*, 75 Utah 398, 286 Pac. 936;

Steinfeld v. *Marteny*, 40 Ariz. 116, 10 P. (2d) 367;

Wichita Sanitarium v. *Bierschback*, 136 Kan. 84, 12 P. (2d) 806;

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Benton, et al., v. *Claar, et al.*, ... Pa. ..., 178 Atl. 520;

Golden Rule Oil Co. v. *Liebst*, 153 Kan. 123, 109 P. (2d) 95.

Conclusion.

For the foregoing reasons, and for the particular reason that the decision of the Circuit Court is a departure from the established law, not only in Oklahoma but in other states having like or similar statutory provisions, and will thus disrupt and cause confusion in the orderly course of judicial decisions in all such states, affecting many and varied types of claims now thought to be barred by limitations, it is respectfully submitted that this petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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A. CAMP BONDS,
Solicitors for Petitioner.